IN THE

Supreme Court Of The United States

OCTOBER TERM, 1951

~~No. 274, Misc.~~ 22 613

RALEIGH SPELLER
PETITIONER,

vs.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The petitioner, Raleigh Speller, has applied to this Court for a writ of *certiorari* for the purpose of having the Court review a decision of the United States Court of Appeals for the Fourth Circuit, the same being No. 6331, decided November 5, 1951, 192 Fed. (2d) 477.

There is filed in this cause as a part of the record in the Federal District Court the record on appeal to the Supreme Court of North Carolina from the Bertie County Superior Court. There is also a transcript of evidence elicited in the Federal District Court in this *habeas corpus* proceeding. Throughout this brief we will refer to the record in the State Court as "S. R." and to the transcript of evidence in the Federal Court as "F. Tr."

The petitioner, a Negro, was thrice tried, convicted and sentenced to death in the Superior Court of Bertie County, North Carolina, for the crime of rape of Mrs. Aubrey Davis, a white woman of about 50 years of age, and subsequently appealed from each of said convictions to the Supreme Court of North Carolina, which appeals are reported as STATE v. SPELLER, 229 N. C. 67, 47 S. E. (2d), 537; STATE v. SPELLER, 230 N. C. 345, 53 S. E. (2d), 294; and STATE v. SPELLER, 231 N. C. 549, 57 S. E. (2d), 759. On the first appeal, the indictment found at the August, 1947, Term of Bertie County Superior Court and the subsequent trial and conviction at the November Term, 1947, of said Court were set aside and petitioner granted a new trial because of jury defect. On the second appeal, the trial and conviction at the November Term, 1948, of said Court, on a bill of indictment returned at the August Term, 1948, by a Grand Jury consisting of members of both the white and Negro races, was set aside and a new trial granted for failure to allow the petitioner sufficient time or opportunity to present his challenge to the array. The validity of the second bill of indictment is not challenged. On the third appeal, the petitioner's conviction at the August Term, 1949, of said Court was affirmed by the North Carolina Supreme Court. Petitioner then attempted to have his case reviewed by petition for *certiorari* filed in the Supreme Court of the United States. This application was dismissed, SPELLER v. NORTH CAROLINA, 340 U. S. 835, 71 S. Ct. 18, 95 L.Ed. 613. This denial was without any dissent. Petitioner then filed a petition for a writ of *habeas corpus* in the District Court of the United States for the Eastern District of North Carolina. The writ was granted. After hearing evidence on the question presented and deciding that petitioner's position was without merit, the writ of *habeas corpus* theretofore issued was vacated and the petition dismissed on the ground that upon the procedural history of the case the petitioner was not entitled to the writ. The opinion of the District Judge is reported as SPELLER v. CRAWFORD, 99 F. Supp. 92. From this decision petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which Court, in a *per curiam* opinion,

SPELLER v. ALLEN, C. C. A. 4, No. 6331, decided November 5, 1951, 192 Fed. (2d) 477, affirmed the action of the District Court.

QUESTION INVOLVED

Appellee submits that the question involved on this appeal should be stated as follows:

1. Where, on a criminal trial in the State Court, the petitioner has challenged the constitution of the Petit Jury on the constitutional grounds that Negros have been arbitrarily and systematically excluded by reason of race and color from the Petit Jury of the county, and this issue determined adversely to the petitioner in the State Court, and *certiorari* having been denied by the Supreme Court of the United States, can this constitutional issue again be retried in a *habeas corpus* proceeding in the Federal District Court?

FACTS

The petitioner was indicted for the capital crime of rape under section 14-21 of the General Statutes of North Carolina, which reads as follows:

> "Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury."

When this case was called for trial at the August term, 1949, of the Bertie County Superior Court, the trial Judge, in compliance with the defendant's motion, ordered "that a special venire from Vance County (Vance County being in the same judicial district as Bertie County) be summoned by the Sheriff of Vance County to attend at the courthouse at Windsor N. C., at 10:30 A. M., on the 31st day of August,

1949, to serve as jurors in said action" and ordered "the Clerk of the Board of County Commissioners of Vance County to cause one hundred scrolls to be drawn from Box No. 1 by a child under ten years of age and the names so drawn shall constitute the special venire; and the Clerk of the Superior Court of Vance County shall insert their names in a writ of venire and deliver the same to the sheriff of Vance County, and the persons named in the writ, and no others, shall be summoned by the sheriff of Vance County to be and appear at the courthouse in Windsor in Bertie County at 10:30 A. M., on the 31st day of August, 1949." "That the said venire shall be drawn as aforesaid in the presence of the defendant, Raleigh Speller, and at least one of his attorneys, and the solicitor of this judicial district at 4:30 P. M., on the 29th day of August, 1949" (S. R. 10, 11 and 12).

Pursuant to the mandate of Section 9-1 of the General Statutes of North Carolina, the Board of County Commissioners for Vance County, at its July, 1949, meeting purged the jury boxes of said county by taking out and destroying all of the scrolls in said boxes and by making up a new jury list and placing in jury box No. 1 the names of persons who were residents and taxpayers of said county, who had paid their taxes for the preceding year, and who were persons of good moral character and qualified to serve as jurors, all free of any racial discrimination. (S. R. 32-33).

The record reveals that the special venire in this case was the first list of jurors drawn from the jury box after it was purged in July, 1949. (S. R. 23).

No challenge was made to the Grand Jury that found the bill of indictment nor was motion made to quash the indictment. After having been arraigned and having entered a plea of not guilty, petitioner, for the first time, challenged the entire array of Petit Jurors and special veiremen summoned from Vance County. This challenge was based on the grounds that the officers, whose duty it was to prepare the jury lists and draw the panels to be summoned by the sheriff, purposefully and systematically discriminated against members of the Negro race, of which the petitioner is one, by excluding Negroes from jury lists

and panels solely and wholly because of their race and/or color, thereby violating the petitioners' right to a fair and impartial trial by his peers as guaranteed under the Constitution and Laws of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States. (S. R. 12 and 13).

Upon the petitioner's challenging the array of petit jurors and moving the Court that the entire array of special veniremen be quashed and set aside, the trial Court caused to be issued a subpoena *duces tecum* to the Chairman of the Vance County Board of Commissioners, the Clerk of said Board, the Clerk of Superior Court, the County Tax Collector and the Sheriff, all of Vance County, requiring them to bring in Court their several records pertaining to the listing, drawing and summoning of jurors in Vance County and the jury boxes and records pertaining thereto. (S. R. 13 and 14).

When said witnesses, records, and jury boxes had been brought into the Court, the defendant was given an opportunity to present evidence in support of his motion that the array of petit jurors and special veniremen summoned from Vance County be quashed and set aside. The petitioner presented several witnesses who testified as to the manner and method of the drawing of the special venire.

After the hearing *voir dire* the Court made a full and complete findings of fact (S. R. 57-63) and overruled or dismissed the motion of challenge to the array of petit jurors and the cause was duly tried by a jury drawn from a panel containing members of the Negro race, which returned a verdict of guilty of rape in the first degree without recommendation of mercy. Upon the conclusion of the hearing as to the alleged discrimination, counsel for both the defendant and the State announced that they did not care to offer further evidence. (S. R. 56). The Court inquired of counsel for the defendant and State if they cared to be heard on their motions and they responded that they did not care to be heard. (S. R. 56 and 57). Counsel for the defendant at no time thereafter renewed his request to be allowed to proceed to examine other scrolls nor did he

tender other witnesses who would testify as to any irregularities concerning the scrolls in the box.

The evidence in this case is of such sordid, revolting and repulsive nature that it will not be set out in detail except to the extent necessary to enable the Court to obtain a true picture of the commission of the crime upon which the petitioner was convicted.

The defendant offered no evidence (S. R. 121) but the State's evidence discloses that Mrs. Aubrey Davis, a woman of 52 years of age, and her totally deaf husband resided alone on the Williamston highway No. 70, about one mile south of the town. On the night of Friday, July 18th, 1947, about 10:30, her husband was asleep and she had undressed but before going to bed went to her back door to fasten it. Upon finding that the lock was broken and the hook bent she went on the back porch to get a hammer to straighten it. As she turned to re-enter the hall door she was rushed upon and dragged into the back yard by the petitioner. In his efforts to quieten her screams, he choked and savagely beat her about the face and body, and finally criminally assaulted her by having sexual intercourse with her forcibly and against her will and, upon consummation of the crime, left her in a critical condition. (S. R. 63, 64, 65, 66, 67 and 77).

Two buttons and some wearing apparel were found at the spot where the crime was committed. When the petitioner was found in a filling station some six hundred yards from the Davis home he was sitting in a chair with his head in his hands, his face scratched and bleeding, and wet with perspiration; his shirt was torn with two buttons missing and upon comparison the buttons found at the scene of the crime where shown to be identical with the remaining buttons on his shirt. (S. R. 92, 93, 94, 96 and 97). When the petitioner was questioned about his torn clothes and the scratches on his face, he replied: "If you are talking about the deaf man's wife, I am the man, but I did not mean to hurt her." (S. R. 95). Mrs. Davis identified the petitioner as her assailant. (S. R. 66).

ARGUMENT

I.

THE MERE FACT THAT A STATE COURT DECIDES CONSTITUTIONAL QUESTIONS IN A CRIMINAL TRIAL DOES NOT WARRANT THE REVIEW OF SUCH DECISIONS IN A HABEAS CORPUS PROCEEDING IN THE FEDERAL COURTS.

Cases dealing with *habeas corpus* in Federal Courts to question State action show that the Federal Courts have imposed severe limitations upon the matters that will be reviewed in such a proceeding. One such limitation is that the mere existence of a constitutional question as to the correctness of a decision of a State Court is not enough to justify the use of the writ of *habeas corpus*. Petitioner, however, all through his brief seems to assume that because a constitutional issue or question was presented in the criminal trial in the State Court and was decided by that Court, he is automatically entitled to review of such question on *habeas corpus* in the Federal Court. We think this is an erroneous viewpoint and that the mere existence of a constitutional question, because of the correctness of a decision of a State Court, is not enough to justify the use of the *habeas corpus* proceeding. In the case of EURY v. HUFF, 4 Cir., 141 Fed. (2d) 554, 555, on this same question, Judge Parker, speaking for the Court said:

> "In addition to this, the question was one that could have been raised only in the original cause and not collaterally by petition to be released on habeas corpus. Riddle v. Dyche, 262 U.S. 333, 43 S.Ct. 555, 67 L.Ed. 1009. A prisoner does not show right to release on habeas corpus merely by showing error on his trial, even though this involves a violation of constitutional right. To entitle him to release on habeas corpus there must have been such 'gross violation of constitutional right as to deny (to the prisoner) the substance of a fair trial and thus oust the court of jurisdiction to impose sentence.' Sanderlin v. Smyth, 4 Cir., 138 F. 2d 729, 731. In the case cited, we laid down with some care the rules applicable to the issuance of the writ of habeas corpus in the case of a prisoner held under

the judgment of a state court. The same rules are applicable in the case of a prisoner held under the judgment of a federal court, except, of course, that the rules as to the exhaustion of state remedies do not apply."

In the case of GLASGOW v. MOYER, 225 U.S. 420, 56 L. ed. 1147, this Court discusses the function of the writ of *habeas corpus* when reviewing State action, and especially when the issues are constitutional, and the Court said:

> "The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. *The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.*" (Emphasis supplied).

In the case of GRAHAM v. SQUIER, 9 Cir., 132 Fed. (2d) 681, the petitioner contended that he was automatically entitled to a writ of *habeas corpus* if any of his constitutional rights had been denied, and for this authority, he cited the case of BOWEN v. JOHNSTON, 306 U. S. 19, 23, 24, 83 L. ed. 455. The petitioner further called attention to an excerpt in Corpus Juris which stated that if evidence was secured by a violation of the defendant's constitutional rights, this would be a ground for the issuance of the writ. In disposing of these contentions, the Court said:

> "Petitioner relies upon the case of Johnson v. Zerbst, 304 U.S. 458, 465-467, 58 S.Ct. 1019, 82 L.Ed. 1461; and upon the case of Bowen v. Johnston, 306 U.S. 19, pages 23, 24, 59 S.Ct. 442, page 444, 83 L.Ed. 455, from which he quotes:
>
> " 'The scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged. (Cases cited.) But if it be found that the court had no jurisdiction to try the petitioner, *or that in its proceedings his*

constitutional rights have been denied, the remedy of habeas corpus is available.'

"In the above quotation the clause italicized is stressed by petitioner, and is particularly relied upon by him because, as hereinbefore stated, it is his contention that at the trial one of his constitutional rights—the guaranty against self-incrimination, as declared by the Fifth Amendment—had been transgressed. Petitioner urges that this Bowen case 'holds that the writ is available when constitutional rights have been denied as well as when jurisdiction is lacking.'

"The language of the emphasized clause in the excerpt from the Bowen case, considered in and of itself and isolated from the text of which it is a part, might seem to indicate, as petitioner would have it, that whenever *any* constitutional right is infringed in a criminal trial, the accused, if he be convicted, may thereafter nullify the judgment by bringing a habeas corpus proceeding. But taking that clause, as is obviously necessary in order to arrive at the true meaning, in conjunction with the statements of the Supreme Court contained in the very same paragraph, and which express the unvaried rule that a criminal action may be collaterally attacked on *jurisdictional* grounds alone, one sees immediately that the Supreme Court intended no more than that the writ of habeas corpus should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof. That this interpretation of the Supreme Court's language is correct will appear from an examination of the sustaining authorities, which are cited in the case immediately following the clause under discussion.

"Petitioner calls to our attention the following statement, excerpted from 29 Corpus Juris at page 47:

" 'But a conviction upon evidence secured by violation of defendant's constitutional rights may afford ground for the writ.'

"That statement is supported by the single case of In re Horschler, 116 Misc. 243, 190 N.Y.S. 355. There the New York court held that when a defendant is

convicted of illegally possessing liquor upon evidence secured through illegal search and seizure, he is entitled to a writ of habeas corpus. Most of the opinion in the case is devoted to ascertaining whether there had been an illegal search and seizure, and when the court arrived at the determination that such had been the case, it concluded summarily that the writ should issue, without an explication as to the purposes and functions of a writ of habeas corpus. It may be that by constitutional provision or by statutory authorization the New York courts are empowered to grant the writ under circumstances such as those existing in the Horschler case; but the matter has been decided to the contrary so far as the federal courts are concerned."

II.

THE ISSUE AS TO WHETHER OR NOT PERSONS OF THE NEGRO RACE WERE UNCONSTITUTIONALLY EXCLUDED FROM THE PETIT JURY WAS PASSED UPON BY THE STATE TRIAL COURT ADVERSELY TO THE PETITIONER AND THIS ISSUE CANNOT NOW BE QUESTIONED OR RETRIED IN A HABEAS CORPUS PROCEEDING.

There is no contention by petitioner that the Superior Court of Bertie County is not a Court of general jurisdiction (G.S. 7-63) or that the Court was without jurisdiction to try persons charged with rape as defined (G.S. 14-21) by the North Carolina statute. We, therefore, say that the Superior Court of Bertie County had jurisdiction, and had a right to decide every question occurring in the case, including the organization and qualification of the petit jury, whether the decision was correct or incorrect, and the proceedings in the Superior Court of Bertie County are not subject to collateral attack by the means of a writ of *habeas corpus* for the reason set forth in the petition, that is, a charge of unconstitutionality in the selection of the Petit Jury of said Court because of racial discrimination.

In the first section of this brief, we set out matters for which *habeas corpus* is not available as a method of review. We propose now to show that the authorities support

the proposition that racial discrimination in the selection of jurors for a Petit Jury is considered to be an irregularity and not subject to attack upon a writ of *habeas corpus* in the Federal Court. Briefly, if the Superior Court of Bertie County originally had jurisdiction over the subject-matter and person of petitioner, it did not lose jurisdiction because of any irregularity in the selection of the Petit Jury. It is not contended that the bill of indictment was not found by eligible grand jurors as such, nor is it contended that the petitioner was convicted by a panel of petit jurors who were within themselves ineligible. Indeed, an inspection of the record will show that of the 100 jurors constituting the special venire from Vance County, 7 were members of the Negro race; that 4 of the 7 Negroes so selected reported to Bertie County (S.R. 59, App. to Brief, p. 33, C.C.A. 4, No. 6331), that the 3 who did not report were dead. (App. to Brief, p. 33, C.C.A. 4, No. 6331); that one of the Negroes was examined on his voir dire, but the jury as finally constituted was composed of members of the white race. There were two Negroes serving on the Grand Jury that found the bill of indictment against the petitioner in Bertie County (App. to Brief, p. 29-40, C.C.A. 4, No. 6331), and as previously stated the constitution of the Grand Jury is not here questioned.

The criminal procedure of North Carolina provides for an appeal to the Supreme Court of North Carolina as a matter of right in all criminal cases, and as we have heretofore pointed out, the Supreme Court of North Carolina does pass upon the question of the constitutionality of the constitution of juries, both Grand Juries and Petit Juries, (STATE v. SPELLER, *supra*). In other words, the question the petitioner sought to raise in his petition for *habeas corpus* was a matter that could be and was passed up on the merits by appeal to the Supreme Court of North Carolina. In support of our position that racial discrimination in the selection of Petit Jury is an irregularity and does not cause the trial Court in the State to lose jurisdiction and is not subject to collateral attack on *habeas corpus*, we desire to cite and quote from the following authorities:

IN RE WOOD, 140 U.S. 278, 35 L. ed. 505
JUGIRO v. BRUSH, 140 U.S. 370, 35 L. ed. 511
ANDREWS v. SWARTZ, 156 U.S. 272, 39 L. ed. 422
KAIZO v. HENRY, 211 U.S. 146, 53 L. ed. 125
IN RE WILSON, 140 U.S. 575, 35 L. ed. 513
EX PARTE MURRAY, 66 Fed. Rep. 297
EX PARTE CEASAR, D.C., Texas, 27 Fed. Supp. 690
U. S. ex rel. JACKSON v. BRADY, D.C., Md., 47 Fed. Supp. 362.
JOHNSON v. WILSON, D.C., Ala., 45 Fed. Supp. 597 (Afirmed
JOHNSON v. WILSON, 5 Cir., 131 Fed. (2d) 1)
STATE ex rel. PASSER v. COUNTY BOARD, 52 A.L.R. 916 (Minn.), Note p. 929
HALE v. CRAWFORD, 1 Cir., 65 Fed. (2d) 739
EURY v. HUFF, App. D.C., 146 Fed. (2d) 17
SCHOLZ v. SHAUGHNESSY, App. D. C., 180 Fed. (2d) 450
U.S. er rel. McCANN v. THOMPSON, 2 Cir., 144 Fed. (2d) 604

In the case of IN RE WOOD, 140 U.S. 278, 35 L. ed. 505, the Court said:

> "If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the Court of General Sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. *Savin, Petitioner*, 131 U. S. 267, 279; *Strauss* v. *Fuller*, 136 U.S. 468, 478. Nor would that error, of itself, have authorized the Circuit Court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege of immunity, specially claimed under the Constitution or laws of the United States, could have been reexamined, and reversed, affirmed or modified, by this court as the law required. Rev. Stat. § 709."

In the case of JUGIRO v. BRUSH, 140 U.S. 370, 35 L. ed. 511, the Court said:

> "The statutes of New York regulating these matters do not, in any way, conflict with the provisions of the Federal Constitution; and if, as alleged, they were so administered by the state court, in appellant's case, as to discriminate against him because of his race, the remedy for the wrong done to him was not by a writ of habeas corpus from a court of the United States."

In the case of IN RE WILSON, 140 U.S. 575, 35 L. ed. 513, the Court said:

> "The response thereto is, that no such act was passed; and that, even if it were, the defect in the number of grand jurors did not vitiate the entire proceedings; so that they could be challenged collaterally on *habeas corpus*, but it was only a matter of error, to be corrected by proceedings in error. It appears from the record that a challenge to the grand jury was made by the petitioner and overruled; but the ground here presented was not taken in such challenge."

In the case of KAIZO v. HENRY, 211 U.S. 146, 53 L. ed. 125, the Court said:

> "These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U.S. 782; *In re Wood*, 140 U.S. 278; *In re Wilson*, 140 U.S. 575. See *Matter of Moran*, 203 U. S. 96, 104. The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. *United States v. Gale*, 109 U.S. 65. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error."

In the case of ANDREWS v. SWARTZ, 156 U.S. 272, 39 L. ed. 422, the Court said:

"The further contention of the accused is that he is restrained of his liberty in violation of the Constitution and laws of the United States, in that persons of his race were arbitrarily excluded, solely because of their race, from the panel of jurors summoned for the term of the court at which he was tried, and because the state court denied him the right to establish that fact by competent proof.

"It is a sufficient answer to this contention that the state court had jurisdiction both of the offense charged and of the accused. By the laws of New Jersey the Court of Oyer and Terminer and general jail delivery has 'cognizance of all crimes and offences whatsoever which, by law, are or shall be of an indictable or presentable nature, and which have been or shall be committed within the county for which such court shall be held.' Rev. Stat. N. J. 272, § 30. If the state court, having entered upon the trial of the case, committed error in the conduct of the trial to the prejudice of the accused, his proper remedy was, after final judgment of conviction, to carry the case to the highest court of the State having jurisdiction to review that judgment, thence upon writ of error to this court, if the final judgment of such state court denied any right, privilege, or immunity specially claimed, and which was secured to him by the Constitution of the United States. *Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel or grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void. Ex parte Siebold,* 100 U.S. 371, 375; *In re Wood,* 140 U.S. 278, 287; *In re Shibuya Jugiro,* 140 U.S. 291, 297; *Pepke v. Cronan,* 155 U.S. 100. *When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the*

accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of habeas corpus.

"The application to the Circuit Court for a writ of *habeas corpus* was properly denied, and the judgment must be *Affirmed.*" (Emphasis supplied)

III.

UPON PETITION FOR WRIT OF HABEAS CORPUS, THE DECISION OF THE FEDERAL COURT IS DISCRETIONARY.

There is a long-established line of cases to the effect that where the Federal Court is reviewing by *habeas corpus* action of the State Courts, the Federal Court has a discretion in its decisions in such matters, and then when coupled with the other principle heretofore commented on that it is only in rare and exceptional cases that this discretion will be used in favor of interference in State action, we say that petitioner has failed to allege or show any circumstance which will warrant a writ of *habeas corpus* or his discharge. The matter is well expressed in the case of LONG v. BENSON, 6 Cir., 140 Fed. (2d) 195, 196, from which we quote as follows:

"In *United States ex rel. Kennedy v. Tyler,* 269 U.S. 13, 17, 46 S.Ct. 1, 3, 70 L.Ed. 138, it was said: 'The rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a write of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws, or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist. *Ex parte Royall,* 117 U.S. 241, 250-253, 6 S.Ct. 734, 29 L.Ed. 868; *In re Wood,* 140 U.S. 278, 289, 11 S.Ct. 738, 35 L.Ed. 505; *In re Frederich,* 149 U.S. 70, 77, 78, 13 S.Ct. 793, 37 L.Ed. 653; *(People of State of) New York v. Eno.* 155 U.S. 89, 98, 15 S.Ct.

30, 39 L.Ed. 80; *Whitten v. Tomlinson*, 160 U.S. 231, 240-242, 16 S.Ct. 297, 40 L.Ed. 406; *Baker v. Grice*, 169 U.S. 284, 290, 18 S.Ct. 323, 42 L.Ed. 748; *Tinsley v. Anderson*, 171, U.S. 101, 104, 105, 18 S.Ct. 805, 43 L.Ed. 91; *Davis v. Burke*, 179 U.S. 399, 401-403, 21 S.Ct. 210 45 L.Ed. 249; *Riggins v. United States*, 199 U.S. 547, 549, 26 S.Ct. 147, 50 L.Ed. 303; *Drury v. Lewis*, 200 U.S. 1, 6, 26 S.Ct. 229, 50 L.Ed. 343; *Glasgow v. Moyer*, 225 U.S. 420, 428, 32 S.Ct. 753, 56 L.Ed. 1147; *Johnson v. Hoy*, 227 U.S. 245, 247, 33 S.Ct. 240, 57 L.Ed. 497'."

There are many other cases to this effect, and we have tried to collect the more important cases as follows:

ASHE v. VALOTTA, 270 U.S. 424, 70 L.Ed. 662
IASIGI v. VAN DeCARR, 166 U.S. 391, 41 L.Ed. 1045
EX PARTE ROYALL, 117 U.S. 241, 29 L.Ed. 868
SWIHART v. JOHNSTON, 9 Cir., 150 Fed. (2d) 721
JOHNSON v. WILSON, 5 Cir., 131 Fed. (2d) 1, 2
EX PARTE MELENDY, 9 Cir., 98 Fed. (2d) 791
URQUHART v. BROWN, 205 U.S. 179, 51 L.Ed. 760
SANDER v. JOHNSTON, 9 Cir., 11 Fed. (2d) 509

In ASHE v. VALOTTA, supra, speaking of the Court's discretion this Court said:

> 'In so delicate a matter as interrupting the regular administration of the criminal laws of the state by this kind of attack, too much discretion cannot be used."

IV.

IN EXERCISING ITS DISCRETIONARY POWERS RELATIVE TO GRANTING OR DENYING HABEAS CORPUS, THE FEDERAL COURT MAY CONSIDER THE ACTION OF THE STATE APPELLATE COURT AND THE DENIAL OF CERTIORARI BY THE SUPREME COURT OF THE UNITED STATES.

In view of the fact that the precise question sought to be raised by the petitioner before the Federal Court has been raised before the Supreme Court of North Carolina and has been decided adversely to him and in view of the denial of *certiorari* by the Supreme Court of the United States, we say that petitioner's case "falls squarely within

the rule that 'a federal district court will not usually re-examine on habeas corpus the questions thus adjudicated'." ADKINS v. SMYTH, 4 Cir., 188 Fed. (2d) 452, and cases therein cited.

In the opinion below, as well as in ADKINS v. SMYTH, *supra*, the Fourth Circuit in citing from STONEBREAKER v. SMYTH, 4 Cir., 163 Fed. (2d) 498, quoted language appropriately pertinent as follows:

> "We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioners were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. *The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia Courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficent reasons for that court to deny a further writ of habeas corpus.* It would be intolerable that a federal district court should release a prisoner on habeas corpus after the State Courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. *This would be in effect to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of White v. Regan*, 324 U.S. 760, 764, 765, 65 S.Ct. 978, 981, 89 L.Ed. 1348, relied on by the court below as follows:
>
> " 'If this court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a Federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex Parte Hawk*, supra, 321 U.S. 118, 64 S.Ct. 448, 88 L.Ed. 572'."

"'The citation of *Ex Parte Hawk* shows that the court had in mind the use of the words 'will not usually re-examine' in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved, in practice unavailbale or seriously inadequate.'" (Emphasis supplied.)

Judge Parker, who wrote the opinion of the Court below, and who also served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure, in an Article (*Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171), outlined the purposes of Title 28, U. S. C., § 2254, as revised, and the abuses it was to correct as follows:

"The thing in mind in the drafting of this section (Title 28, U. S. C. § 2254) was to provide *that review of state court action be had so far as possible only by the Supreme Court of the United States, whose* review of such action has historical basis, and *that review not be had by the lower federal courts, whose exercise of such power is unseemely and likely to breed dangerous conflicts of jurisdiction.*" (Emphasis Supplied).

"The provisions of the Revised Code with respect to habeas corpus are very largely a mere codification of the best practice already worked out by court decisions. Even so, they are important in clarifying matters which were subject to misunderstanding and in pointing out how the abuses which have arisen in connection with habeas corpus may be avoided. There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the ground that they have been denied the sort of trial guaranteed by the Constitution, but effective provision is made against the unseemly incidents which have arisen in the assertion of the right. *There will be no more shopping around from judge to judge with the same old case. There will be no more dragging of a judge into court to defend before another judge the procedure of his court. There will be no more cases*

of a federal judge in one district passing upon the validity of proceedings of a federal court in another district on no more substantial basis than the unsupported oath of a convicted felon. And last, but not least, there should be no more cases where proceedings of state courts, affirmed by the highest courts of the state, with denial of certiorari by the Supreme Court of the United States, will be reviewed by federal circuit or district judges. (Emphasis supplied).

"It is believed that the effect of these provisions of the Revised Code will be to *protect the courts in the administration of criminal justice from the delays, harassments and unseemly conflicts of jurisdiction which have arisen under recent habeas corpus decisions, without in anywise impairing the rights which it was the purpose of these decisions to protect.* The habeas corpus procedure which led to abuse was laid down by the Supreme Court out of a desire that complete justice be done in every case. The provisions of the Revised Code preserve everything of importance in that procedure while eliminating the abuses to which it has given birth." (Emphasis supplied).

It is respectfully submitted under all the circumstances of the petitioner's case that he had a full and fair adjudication of the federal contentions raised by him before the Supreme Court of the State of North Carolina. There was no failure to afford him same. The procedures of the North Carolina Courts afforded him appellate review as a matter of right on the precise question which he now raises before the Federal Court. The petitioner had his full and fair adjudication there and an additional opportunity before the Supreme Court of the United States. It is respectfully submitted that there must be an end to litigation at some place especially when as in petitioner's case every avenue for relief to which he was entitled was utilized by him. The conclusion of the STONEBREAKER Case is inescapable, if there had been merit in petitioner's contention, certainly relief would have been afforded him at some point.

V:

PETITIONER IS NOT ENTITLED TO THE RELIEF SOUGHT BY HIM ON THE MERITS OF HIS CASE, SINCE HE HAS NOT SHOWN INTENTIONAL, ARBITRARY AND SYSTEMATIC EXCLUSION OF ELIGIBLE PERSONS OF PETITIONER'S RACE FROM PETIT JURIES IN VANCE COUNTY.

On the merits of his case, both before the North Carolina Courts and the Federal District Court, petitioner has failed to show that there was any discrimination against him or members of his race in the preparation of the jury box, the selection of the special venire, the petit jury that tried him or at any stage from his indictment until final judgment.

An examination of the record in the trial court will show that the petitioner in this case was tried in the State Courts in the same manner as any other defendant of any other race. The trial Court was very patient and cautious and inquired thoroughly into the question of jury discrimination. (S.R. 16-63). From the record there is not the slightest evidence as to any discrimination against the petitioner because of race, but the trial record does strongly indicate and show that, in fact, because of petitioner's race, a much more painstaking and patient research into the facts and details was taken than would probably have been the case of persons of the white race. There is not the slightest indication that the trial court committed any unconstitutional act that caused it to lose jurisdiction. There is not the slightest indication of any violence or mob action; but on the contrary, the trial shows a careful and well-developed hearing, which it is submitted is the very essence of due process of law. There is nothing to show that the judgment of the trial court is invalid. No exceptional circumstances have been shown which would justify a Federal Court in interfering with the administration of justice by a Sovereign State in its own Courts.

The State of North Carolina does not deny that the intentional, arbitrary and systematic exclusion of Negroes from jury service on either the grand jury or the trial panel is an unconstitutional discrimination prohibited by

the *equal protection* and *due process clauses* of the Fourteenth Amendment to the Constitution of the United States and the *law of the land* clause of Article 1, Section 17, of the Constitution of the State of North Carolina, this provision of our State Constitution being equivalent to the *due process of law* clause of the Federal Constitution. Long before the happening of the events which led up to the so-called Scottsboro and other cases cited by the defendant, the Supreme Court of North Carolina held, in the year 1902, that the exclusion of persons of the Negro race, where they were excluded solely because of their race or color, is a violation of th Constitution of the United States.

STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814
STATE v. DANIELS, 134 N.C. 641, 46 S.E. 743

The question raised goes to the administration of the jury system rather than the statutes upon which the administration is based. Chapter 9 of the General Statutes of North Carolina regulating the methods for the selection of both grand jurors and petit jurors, and their qualifications for jury service, has been held constitutional and not discriminatory by our State Supreme Court and has been before the Supreme Court of the United States and this Court has not said that the statutes themselves are discriminatory or unconstitutional.

STATE v. WALLS, 211 N.C. 487, 191 S.E. 232
(Certiorari denied
WALLS v. NORTH CAROLINA, 302 U.S. 635, 82 L. ed. 494)
BRUNSON v. NORTH CAROLINA, 332 U.S. 851, 92 L.ed. 1132

Petitioner in the Federal District Court made much of the contention that G.S. 9-1 imposed a mandatory duty on the jury commission of the several counties of North Carolina to do more than refer to the tax returns of the several counties in making up jury lists from which grand and petit juries were to be drawn (F.Tr. 12, 16, 20). This precise question has been decided by the Supreme Court of

North Carolina in STATE v. BROWN, 233 N.C. 202, 63 S.E. (2d) 99.

Chief Justice Stacy, in writing the opinion of the Court in STATE v. BROWN, *supra*, met this contention squarely and answered it as follows:

> "Whatever may be the holding in other jurisdictions, it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory, and not mandatory, in the absence of proof of bad faith or corruption on the part of the officers charged with the duty of selecting the jury list. S. v. Mallard, 184 N.C. 667, 114 S.E. 17 and cases there cited. Not only has no bad faith or corruption been shown on the part of the officers here, but none has so much as been suggested. S. v. Smarr, 121 N.C. 669, 28 S.E. 549. Hence, the motions to quash and in arrest were properly overruled."

It is when a Negro defendant is deprived, by design of the chance of having Negroes on the jury that the Fourteenth Amendment to the United States Constitution may be invoked for his protection.

STRAUDER v. WEST VIRGINIA, 100 U.S. 303, 25 L.ed. 664
NORRIS v. ALABAMA, 294 U.S. 587, 79 L.ed. 1074
HOLLINS v. OKLAHOMA, 295 U.S. 394, 79 L.ed. 1500
HALE v. KENTUCKY, 303 U.S. 613, 82 L.ed. 1052
PIERRE v. LOUISIANA, 306 U.S. 354, 83 L.ed. 757
SMITH v. TEXAS, 311 U.S. 128, 85 L.ed. 84

In AKINS v. TEXAS, 325 U.S. 398, 89 L.ed. 1692, the Court uses the words "purposeful discrimination." In NORRIS v. ALABAMA, *supra*, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the defendant to show an alleged discrimination in the selection of a grand or petit jury.

AKINS v. TEXAS, 325 U.S. 398, 89 L.ed. 1692
MURRAY v. LOUISIANA, 163 U.S. 101, 41 L.ed. 87

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other words, discrimination in the selection of a jury will not be presumed.

TARRANCE v. FLORIDA, 188 U.S. 519, 47 L.ed. 572, 116 So. 470 (Fla.). (Certiorari denied in 278 U.S. 599, 73 L.ed. 525)

Fairness in selection has never been held to require proportional representation of races upon a jury.

STATE v. KORITZ, 227 N.C. 553, 43 S.E. (2d) 77 (Certiorari denied 92 L.ed. 354)
AKINS v. TEXAS, 325 U.S. 398, 89 L.ed. 1692
VIRGINIA v. RIVES, 100 U.S. 313, 25 L.ed. 667
THOMAS v. TEXAS, 212 U.S. 278, 53 L.ed. 512
ZIMMERMAN v. STATE (Md.), 59 A (2d) 675 (Certiorari denied 93 L.ed. (Ad. Op. No. 7) 425)

A defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.

STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814
STATE v. SLOAN, 97 N.C. 499
STATE v. LOGAN, 341 Mo. 1164, 111 S.W. (2d) 1101
MARTIN v. TEXAS, 200 U.S. 316, 50 L.ed. 494

"It is unsafe we thing, to attach too much significance to abstract mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

SWAIN v. STATE, 215 Ind. 259, 18 N.E. (2d) 921, 926

The defendant challenged the array of petit jurors and moved the Court that the entire array of special veniremen be quashed and set aside and caused to be issued a subpoena duces tecum to the Chairman of the Vance County Board of Commissioners, the Clerk of said Board, the Clerk

of the Superior Court, the county tax collector and the sheriff, all of Vance County, requiring them to bring their several records pertaining to the listing, drawing and summoning of jurors in Vance County and the jury boxes and records pertaining thereto. (S.R. 13 and 14).

When said witnesses, records and jury boxes had been brought into the Court the defendant was given an opportunity to present evidence in support of his motion that the array of petit jurors and special veniremen summoned from Vance County be quashed and set aside.

F. H. ELLINGTON, Chairman of the Board of Commissioners of Vance County, is quoted as having testified: "I have lived in Vance County since 1915, that is, about 34 years, and during that 34 years I have never known a Negro to be called for jury, grand or petit." (S.R. 16). This evidence is only negative in character but the witness testified affirmatively that he had served on the Board of Commissioners for Vance County for only 20 months "and during the time that I have held this position colored persons were drawn to serve on the jury in Vance County. I do not know who they were but there are a number of them". (S.R. 16). The witness testified further that there had been no purposeful discrimination between the races but that the Commissioners selected names for the jury from the tax books and from the tax lists who were "law abiding citizens, taxpayers and persons of good moral character, and I followed that proceeding in the selection of the names of the colored people." (S.R. 17). H. M. ROBINSON, Clerk of the Board of Commissioners of Vance County for some 19 years, was quoted as testifying: "as Clerk of the Board I am present when persons are drawn for jury duty in Vance County; I don't know when Negroes were drawn for jury duty in Vance County; I write down the names they read to me; I don't know whether any Negroes' names were drawn for jury duty during those 18 years." In addition thereto the witness testified: "I make the list and turn it over to the Chairman of the Board, and each Township has white and colored according to the race all in the same book. And I only prepare a list from the tax books." (S.R. 18). He further testified that he was present when the jury

list was revised and purged in July, 1949, and that "This list was made up from both colored and white citizens whose names appear upon the tax scrolls of Vance County who in the opinion of the Commissioners are men of good moral character, men and women of good moral character and qualified to serve as jurors, and who had paid their taxes." (S.R. 21). He further testified that in the purging and revision of the jury list that no systematic purpose or effort to exclude any member of the colored race was made; that "the jury box from which the special venire was drawn for this trial was composed of both white and colored jurors in fair proportion to the number among the races, and the people who were qualified from both races from a moral standing and character, and moral fitness to serve as jurors". (S.R. 21). The witness also testified that at the revision of the jury box on the first Monday in July "There weren't anything said by way of discrimination against placing the names of colored people in the jury box, and that there weren't anything placed on them in any way to indicate that the name on the scroll was Negro or white, the only thing there was just the Township number for each one, and that applied to whites as well as Negroes". (S.R. 22).

The evidence of the other witnesses was of similar import in that it was largely negative in character, the witnesses merely saying that they did not know of any Negroes who had served on the jury in Vance County but admitted that they know nothing about the composition of the jury list in the box as of July 1st, 1949. While some of the witnesses testified that they had lived in the County all of their lives and had never been called on to serve as jurors, the record is silent as to whether the witnesses were members of the Negro or white race. Most of the persons identified as being qualified to serve on the jury were doctors, dentists, undertakers, embalmers and others exempted under G.S. 9-19 from jury duty. Certain school teachers were pointed out as persons qualified to serve on juries who had not served but the record fails to show whether such persons resided in the county only during the school terms or were actually residents and taxpayers of the county.

The special venire summoned in this case was drawn from the list placed in the July 1st 1949 jury box, but it will be noted that the petitioner's evidence relates to alleged irregularities and discrimination existing prior to the making up of the 1949 list. To allow the petitioner to show, if he could, that irregularities appeared in the 1949 jury list, the Court ordered the box to be produced in Court and be opened by the Sheriff of the County in the presence of four County Commissioners, the Clerk of the Board of Commissioners and counsel for the petitioner. The petitioner, through his counsel, was permitted to make such examination of the scrolls therein contained as he desired. (S.R. 42).

A large number of scrolls were drawn from the box, including the names of both white and Negroes, and others unidentified as to race. Before or after the names on many of the scrolls appeared a dot which the petitioner contends was placed on the scrolls prior to the time they were put in the jury box for the purpose of identifying them as to race, but the record is silent as to who placed the dots on the scrolls or their purpose. The petitioner's witnesses identified many of the scrolls but were unable to distinguish between members of the white and colored races by such dots. (App. to Brief, pp. 51-53, C.C.A. 4, No. 6331.)

Only a part of the scrolls were drawn from the box but 104 of these were Negroes. (S.R. 54).

It is not sufficent for the petitioner merely to show irregularities in the composition of jury boxes prior to July 1st, 1949 but he must show affirmatively that purposeful discrimination was employed or other irregularities existed in the list constituting the 1949 box from which the special venire was drawn. This he has failed to do. Of the special venire of 100 scrolls drawn from the Vance County 1949 box in the presence of the petitioner and at least one of his attorneys, sixty-three including four Negroes, appeared in the trial Court at the appointed time. The record is silent as to why none of these Negroes sat as members of the trial jury, (S.R. 59) though there is an intimation that one was examined on the *voir dire*.

This Court in CASSELL v TLXAS, 339 U.S. 282, 94

L.ed. 563 (Adv. Sh. 13), quoting from HILL v. TEXAS, 316 U.S. 400, 404, 62 S.Ct. 1159, 1161, 86 L.ed. 1559, said:

> "The existence of the kind of discrimination described in the Hill case does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. SINCE THE ISSUE MUST BE WHETHER THERE HAS BEEN DISCRIMINATION IN THE SELECTION OF THE JURY THAT HAS INDICTED PETITIONER, it is enough to have direct evidence based on the statements of the jury commissioners in the very case. Discrimination may be proved in other ways than by evidence of long continued unexplained absence of Negroes from many panels. The statements of the jury commissioners that they chose only whom they knew, and that they know no eligible Negroes in an area where Negroes made up so large a proportion of the population, prove the intentional exclusion that is discrimination in violation of petitioner's constitutional rights." (Emphasis added).

PATTON v. MISSISSIPPI, 322 U.S. 463, 92 L.ed. 76

The respondent's evidence shows affirmatively that eligible persons of the Negro race were not intentionally, purposefully and systematically excluded from petit juries in Vance County, and in particular the special venire drawn from the 1949 Jury box. (App. to Brief pp. 53-59, C.C.A. 4, No. 6331.)

The petitioner on page 20 and 22 of his brief insists that dots or periods appeared before the names on scrolls representing members of the Negro race for the purpose of identification. This statement is wholly unsupported by any evidence. On the contrary the evidence affirmatively shows that the dots appearing were not used for the purpose of identification and the witnesses were unable to identify the names on such scrolls as either whites or Negroes.

STATE v. WALLS, 211 N. C. 487, 191 S.E. 232
WALLS v. NORTH CAROLINA, 302 U.S. 635, 82 L. ed. 494

Under the North Carolina practice the trial Court is required at the close of the *voir dire* to make appropriate

findings of fact. In the instant case the Court made such findings of fact based on the evidence and denied the petitioner's motion to quash the entire array of the petit jury and special veniremen summoned from Vance County (S.R. 57 through 63) (App. to Brief, pp. 41-45, C.C.A. 4, No. 6331.)

While it is recognized by the State that on a question of this kind this Court will examine the facts and evidence to see if fundamental constitutional rights have been denied, STATE v. SPELLER, 229 N.S. 67, nevertheless, in State and Federal courts great weight is accorded to the findings of the presiding judges who make the initial decisions and have a better opportunity to investigate the facts.

THOMAS v. TEXAS, 212 U.S. 278, 53 L.ed. 512
AKINS v. TEXAS, 325 U.S. 398, 89 L.ed. 1692

In THOMAS v. TEXAS, *supra*, this Court said:

> "As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such causes as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the Negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a Negro juror on the grand jury which indicted plaintiff in error, and there were Negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

In AKINS v. TEXAS, *supra*, the Court said:

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who

> heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, NORRIS v. ALABAMA, 294 U.S. 587, 589, 590, 79 L.ed. 1074, 1076, 1077, 55 S.Ct. 579; SMITH v. TEXAS, 311 U.S. 123, 130, 85 L.ed. 84, 86, 61 S.Ct. 164, we accord in that examination great respect to the conclusion of the state judiciary, PIERRE v. LOUISIANA, 306 U.S. 354, 358, 83 L.ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process'."

We say that at the hearing before the Federal Court nothing new to strengthen petitioner's contention was brought out, but on the contrary the evidence tended to show that petitioner had been afforded every right guaranteed to him by the Federal Constitution. The evidence showed that petitioner had been indicted by a Grand Jury of which two of the members thereof were members of the Negro race. (App. to Brief, p. 39, C.C.A. 4, No. 6331:) It also established the fact that the jury box of Vance County from which was drawn the special venire for Bertie County and from which the petit jury which tried petitioner was selected, was duly purged according to the laws and statutes of North Carolina and that names of members of both races were placed therein without regard to whether they were members of the white or Negro race. (F.Tr. 14, 16, 34, 38). That at this hearing it was established that 145 names of Negroes were in both sections of the Jury Box, *ie*, Box 1 and 2. (F.Tr. 92). That of the 100 jurors constituting the special venire for Bertie County, 7 were members of the Negro race; (F.Tr. 23) (App. to Brief, p. 33, C.C.A. 4, No. 6331); that 4 of the 7 Negroes so selected reported to Bertie County (App. to Brief, p. 33, C.C.A. 4, No. 6331); that the 3

who did not report were dead. (App. to Brief, p. 33, C.C.A. 4, No. 6331). That of the 41 Negroes whose names were contained in Box 2, the evidence shows that the Sheriff of Vance County and his deputies summoned all those drawn for jury duty without regard to race (App. to Brief, p. 34, C.C.A. 4, No. 6331, F.Tr. 83, 93, 94). That these records show that four Negroes served as members of the Grand Jury from the time the Box was made up until January, 1951. (App. to Brief, p. 34, 35, C.C.A. 4, No. 6331, F.Tr. 82, 95). That the remaining Negroes, except 7 who were not to be found within the county by the Sheriff and four others, one of whom was a fugitive from justice, served as members of jury panels at all but several terms of the Superior Court of Vance County. (App. to Brief, p. 34-35, C.C.A. 4, No. 6331). That an average of three or four Negroes has served on the jury panel of Vance County during each term of Superior Court, subsequent to the purging of the jury box in July, 1949. (App. to Brief, p. 34-35, C.C.A. 4, No. 6331, F.Tr. 82-88, 95).

CONCLUSION

We do not think there has been shown in this case any gross violation of constitutional right of such a nature as would authorize a Federal Court to disturb the trial in the State Court by a *habeas corpus* proceeding. In the case of SANDERLIN v. SMYTH, 4 Cir., 138 Fed. (2d) 729, Judge Parker, speaking for the Court, said:

> "The writ of habeas corpus may be issued by a federal court or judge in cases where petitioner is imprisoned under the Judgment of a State Court only if it is made to appear, (1) *that there has been such gross violation of constitutional right as to deny the substance of a fair trial, and the prisoner has not been able to raise the question on the trial because of ignorance, duress or other reason for which he should not be held responsible*, (2) that he has exhausted his remedies under state law, and (3) that no adequate remedy is available to him under state law, either because state procedure does not provide adequate corrective process or because there are exceptional circumstances, such as local prejudice or an inflamed condition of the public

mind, which render it impossible or unlikely for him to obtain adequate protection of his right in the courts of the state, i.e. he is entitled to the writ in the federal courts 'only when the state courts will not, or cannot, do justice'. United States ex rel. Lesser v. Hunt, 2 Cir., 117 F. 2d 30, 31; Moore v. Dempsey, *supra*." (Emphasis supplied).

The result of the whole matter as to the position of the Federal Courts on habeas corpus is well stated in the case of U. S. ex rel. FEELEY v. RAGEN, 7 Cir., 166 Fed. (2d) 976, where the Court said:

"We should not lose sight of the fact that the Federal courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own police affairs, as the Constitution recognized when the police power was left with the States. *We are not super-legislatures or glorified parole boards.* We as courts look only to the violation of Federal Constitutional rights. When we condemn a State's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the State. That is the reason that in habeas corpus cases the relator must first show that he has exhausted his State remedies to open the way for the Federal courts to try the State's exercise of its sovereign power. For after all, the State represent the people more intimately than the Federal Government.

"To redress an alleged imbalance between the State's exercise of its power and the rights of the individual, the Federal courts exercise a delicate function, the importance of which points up our duty to consider that imbalance in the light of the rights of organized society through the State Government, representing all the people, as against the relator-defendant. There is no room here for crusaders or the fulfillment of missions. We are to hold the balance true. Frank v. Mangum, 237 U. S. 309, 329, 35 S. Ct. 582, 59 L. Ed. 969; Urquhart, Sheriff v. Brown, 205, U.S. 179, 183, 27 S.Ct. 459, 51 L.Ed. 760; Baker v. Grice, 169 U.S. 284, 290, 291, 18 S.Ct. 323, 42 L.Ed. 748." (Emphasis supplied).

The petitioner was tried in a court of general jurisdiction

in Bertie County, North Carolina, and he raised the constitutional issue which he is now asking this Court to retry. This issue was decided on its merits adversely to petitioner in the State Courts, and being dissatisfied with these decisions, the petitioner is simply asking the Federal Court to use the writ of *habeas corpus* as a substitute for an appeal and thereby retry the issue again. In other words, the Federal Court, according to petitioner's concepts, would be a super court of appeals. We think that we have clearly shown that this is not the proper use of *habeas corpus*. The petitioner had the precise question before this court reviewed by the Supreme Court of North Carolina. The petitioner availed himself fully thereof, and, as we see it, he can not complain and assert that he is entitled to retry the case in the Federal Court, especially since the Supreme Court of the United States, having before it a record of all the proceedings and knowing the seriousness of the situation, saw fit to deny petitioner's application for a writ of *certiorari*. The conclusion of STONEBREAKER v. SMYTH supra, relied on by the Court below, is inescapable; certainly relief would have been afforded petitioner at some point had there been merit in his contention.

Respectfully submitted,

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APPENDIX

Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

Chapter 14, General Statutes of North Carolina:

§ 14-21. *Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury.

Chapter 9, General Statutes of North Carolina:

§ 9-1. *Jury list from taxpayers of good character.*—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over

twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trials of civil cases exclusively, when they

need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.* — All practicing physicians, licensed druggists, telegraph operators who are

in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard. North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said

court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.* —When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.